Supreme Court, U.S.
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No. 94-

In The

Supreme Court of the United States

October Term, 1994

UNITED WORLD TRADE, INC.,

Petitioner,

vs.

MANGYSHLAKNEFT OIL PRODUCTION ASSOCIATION, KAZAKHSTAN COMMERCE FOREIGN ECONOMIC ASSOCIATION, and MINISTRY OF ENERGY AND FUEL RESOURCES OF KAZAKHSTAN REPUBLIC,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

PHILLIP D. BARBER
(Counsel of Record)
TERRY JO EPSTEIN
DUFFORD & BROWN, P.C.
1700 Broadway, Ste. 1700
Denver, CO 80290-1701
Telephone: 303/861-8013

Attorneys for Petitioner United World Trade, Inc.

November 23, 1994

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the United States District Courts have jurisdiction over a foreign sovereign to adjudicate a dispute based upon the foreign sovereign's breach of contract, when the ultimate place of performance of the foreign sovereign's obligations was outside the territory of the United States?

2. Whether Respondents' breach of contract, which meant that payments which should have been forthcoming to the United States were not, caused a "direct effect" in the United States so as to subject the Respondents to suit in the United States as provided in the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §1605 (a)(2)?

3. Whether the fact that Petitioner incurred a six million dollar liability in the United States as a consequence of Respondent's breach satisfied the "direct effect" requirement of 28 U.S.C. 1605(a)(2)?

PARTIES TO THE PROCEEDING BEFORE THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

United World Trade, Inc.

Phillip D. Barber, Esq.
Terry Jo Epstein, Esq.
Dufford & Brown, P.C.
1700 Broadway, Ste. 1700
Denver, CO 80290-1701

Mangyshlakneft Oil Production Association,
Kazakhstan Commerce Foreign Economic Association,
Ministry of Energy and Fuel Resources of the Republic of Kazakhstan

Gordon G. Greiner, Esq.
Davis O. O'Connor, Esq.
Stephen A. Bain, Esq.
Holland & Hart
555-17th Street, Ste. 2900
Denver, CO 80202

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No. 94-_____

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UNITED WORLD TRADE, INC.,

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MANGYSHLAKNEFT OIL PRODUCTION ASSOCIATION, KAZAKHSTAN COMMERCE FOREIGN ECONOMIC ASSOCIATION, and MINISTRY OF ENERGY AND FUEL RESOURCES OF KAZAKHSTAN REPUBLIC,

Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Tenth Cirucit

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully requests that a Writ of Certiorari be issued to review the Judgment and Opinion of the United States Court of Appeals for the Tenth Circuit in this case.

REFERENCE TO THE OFFICIAL OPINIONS DELIVERED IN THIS CASE BY OTHER COURTS

1. United World Trade, Inc. v. Mangyshlakneft Oil Production Association, et al., 821 F. Supp. 1405 (D. Colo. 1993).

2. United World Trade, Inc. v. Mangyshlakneft Oil Production Association, et al., 33 F.3d 1232 (10th Cir. 1994).

STATEMENT OF THE GROUNDS ON WHICH JURISDICTION OF THIS COURT IS INVOKED

1. Review is sought of the Judgment and Opinion of the Tenth Circuit Court of Appeals, dated August 29, 1994. United World Trade Inc. v. Mangyshlakneft Oil Production Association, et al., 33 F.3d 1232 (10th Cir. 1994).

2. Rehearing was sought by Petitioner from the Tenth Circuit Court of Appeals and was denied on September 21, 1994.

3. The statutory provision believed to confer on this court jurisdiction to review the judgment of the Tenth Circuit Court of Appeals by Writ of Certiorari is 28 U.S.C. §1254(1).

STATUTES INVOLVED IN THIS CASE

1. 28 U.S.C. §1605(a)(2), which provides:

> (a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case --
>
> * * *
>
> (2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States. (emphasis supplied).

STATEMENT OF THE CASE

Invoking jurisdiction on the basis of 28 U.S.C. §§1602, 1603, and 1605(a)(2), Petitioner United World Trade, Inc. ("UWT") filed suit in the United States District Court for the District of Colorado against Respondents, Mangyshlakneft Oil Production Association ("MOP"), Kazakhstan Commerce Foreign Economic Association ("Kazcom"), and Ministry of Energy and Fuel Resources of the Republic of Kazakhstan ("Ministry"). UWT asserted claims for breach of written contract, anticipatory repudiation of contract, and for fraud and misrepresentation.

This case involves the application of the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C., §1602 et. seq., to several written agreements and commercial transactions between UWT and the Respondents, all of whom are agencies or instrumentalities of the Republic of Kazakhstan. Those agreements were entered into for the purpose of allowing UWT to sell oil produced by the Republic of Kazakhstan in exchange for a portion of the sales proceeds. UWT was required to remit the proceeds of the oil sales to the Respondents, after deducting UWT's commission and various other charges.

UWT is a Colorado corporation which maintains its principal place of business in Denver, Colorado. Respondent MOP is wholly owned and controlled by the Republic of Kazakhstan and has authority to conduct oil production and export oil on behalf of the Republic. Respondent Ministry is also controlled by the Republic of Kazakhstan and has assumed MOP's responsibility for producing and exporting crude oil owned by the Republic of Kazakhstan, as well as MOP's responsibilities, rights and obligations under the contracts with UWT. Respondent Kazcom is a state-owned enterprise of Kazakhstan, akin to a chamber of commerce, which acted as an agent for MOP in its sale of crude oil to UWT.

UWT entered into three written agreements with the Respondents. The initial agreement was a "Protocol Agreement" between UWT and representatives of the Respondents, which was signed on July 25, 1991, in Alma-Ata, Kazakhstan. In the Protocol Agreement, both sides expressed their interest in developing joint ventures and production cooperation in the fields of oil and other petrochemicals, and in trading these products. The Respondents were to study the possibility of selling products to UWT, and UWT was to study

the possibility of investing in an oil refinery plant and in selling Kazakhstan's finished oil production in the world market.

After the Protocol Agreement was signed, UWT and the Respondents continued negotiating toward a joint venture to export Kazakhstan's oil. Those negotiations involved face-to-face meetings in Moscow and Alma-Ata, as well as communications with UWT at its office in Denver via the United States mail, telephone, and fax machines.

On December 17, 1991, UWT, MOP and Kazcom signed a Preliminary Agreement in Moscow. In the Preliminary Agreement, UWT agreed that it would (1) provide a selection of potential buyers for Kazakhstan's Buzachi oil in allotments of up to one million metric tons per year and (2) sell up to two hundred thousand metric tons of oil during the first quarter of 1992. UWT also offered to create a joint venture and implement a feasibility study for the purpose of using the profits from the oil sales to "provide financing for the future plans of the refinery at Mangyshlak peninsula." For its part, MOP promised to hold negotiations with UWT and its prospective buyers, to provide up to 200,000 metric tons of oil in the first quarter of 1992 if a qualified buyer was found by UWT, and to make available for sale by UWT an additional 800,000 metric tons of oil during the remainder of 1992. MOP promised that it would "not circumvent UWT or [Kazcom] and deal directly with anyone UWT identifies as a potential customer or brings in for negotiations." Kazcom, also a party to the Preliminary Agreement, promised assistance in facilitating and coordinating the relationships between UWT, MOP and the prospective buyer.

UWT successfully completed its obligation to present a refinery specializing in Buzachi oil which was acceptable to the Respondents, an Italian company in Sicily named ISAB, and the parties entered into a third agreement: the January 23, 1992 Contract for Sale of Crude Oil ("Contract"). The Contract provided that MOP was the "seller" and was required to supply UWT and Kazcom (collectively referred to in the Contract as the "buyers") with 200,000 metric tons of oil during January, February and March, 1992. UWT was to pay MOP "97 percent of the price paid by [UWT's] customer" after price adjustments had been made per the Contract. The Contract spelled out in detail the manner and method of payment, requiring payment:

> In U. S. Dollars by irrevocable documentary credit opened by a first class European/U.S.A. bank and notified through advising bank, with payment for seller's account at thirty (30) calendar days from B/L date against presentation of commercial invoice and other usual shipping documents at bank counters. Letter of credit to be opened before loading.
>
> * * *
>
> Payment falling due on Sunday or Monday banking holiday in New York shall be made on the first following banking day. Payment falling due on Saturday or any other banking holiday in New York shall be made on the preceding banking day.
>
> All bank commissions and sundry charges outside buyer's bank are for seller's account.

The designation of a European/U.S.A. bank as the means of achieving payment between UWT and the Respondents was an integral and necessary part of the transaction. The Contract also required that payment to the Respondents be in U.S. dollars. Payment in dollars was actually accomplished throughout the life of the Contract by having the proceeds of the sale of Respondents' oil transferred from a European bank (the San Paolo Bank) to its New York branch, which in turn transferred the funds through Citibank of New York for conversion into U.S. dollars. Once converted into U.S. dollars, Citibank transferred 97 percent of the proceeds to MOP's bank in Paris, and the remainder to UWT's account at a bank in Denver, Colorado. The first two oil shipments in 1992 occurred without incident. For each of the first two shipments, payments were converted into U.S. dollars and distributed to Petitioner and Respondents through the European and New York banks, as described.

A problem arose when UWT delivered the third allotment of crude oil to the Italian refinery, because Respondents had failed to supply the original bill of lading to UWT. To sell the oil, UWT had to issue a contractual guaranty to indemnify the refinery against potential third-party claims to the oil in an amount of $6 million for a period of 6 years.

Although UWT successfully sold the third shipment of oil on Respondents' behalf, Respondents refused to provide UWT with any additional oil and breached the Contract and Preliminary Agreement. Respondents then began selling their oil directly to ISAB in violation of the noncircumvent provisions of the Preliminary Agreement. Because UWT had no oil to sell, funds no longer were transferred to the U.S. banks for conversion into U.S. dollars and for distribution to

UWT and Respondents. Citibank lost its commission for converting the funds, and UWT no longer received its share of profits from the New York banks. UWT has also alleged that a direct effect of Respondents' breach was the financial damage suffered by UWT from the loss of income and profits flowing to its Denver office from the sale of Respondents' oil, and from having to sign the $6 million guaranty with the refinery. UWT has had to reduce staff in its Denver office and has experienced adverse cash flow due to Respondents' breach.

UWT filed suit in the United States District Court for the District of Colorado for breach of contract, anticipatory repudiation of contract and for fraud and misrepresentation. Respondents filed a Motion to Dismiss UWT's claims on the grounds that the District Court lacked subject matter and personal jurisdiction over the Respondents, and because the District of Colorado was not the proper venue for the case. Following a hearing on Respondents' motion, the District Court ruled that it lacked subject matter jurisdiction over the case, largely because the District Court found that the Respondents' actions did not cause a "direct effect" in the United States. Citing cases that were disapproved by this Court in *Republic of Argentina v. Weltover, Inc.*, ___ U.S. ____, 112 S.Ct. 2160, 119 L.Ed.2d 394 (1992)[1], the District Court rejected jurisdiction because it determined that the Contract did not require performance by Respondents in the United States. *United World Trade,* 821 F.Supp. at 1408-1409.

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[1] *e.g. Zedan v. Kingdom of Saudi Arabia*, 849 F.2d 1511, 1514 (D.C.Cir. 1988)

UWT promptly filed its notice of appeal. On August 29, 1994, the Tenth Circuit Court of Appeals affirmed the District Court's decision, holding that the Respondents' actions did not cause a direct effect in the United States within the meaning of 28 U.S.C. §1605(a)(2). In its opinion, the Tenth Circuit acknowledged that Respondents' breach caused an "effect" in this country. However, the Tenth Circuit held that the effect was not "direct" and distinguished the instant case from *Weltover* on the grounds that "no part of the contract in this case was to be performed in the United States." *United World Trade*, 33 F.2d at 1237.

ARGUMENT AMPLIFYING THE REASONS RELIED ON FOR THE ALLOWANCE OF THIS WRIT

The decision of the United States Court of Appeals for the Tenth Circuit poses an important question of federal law that has far-reaching implications for American firms which transact business abroad; namely, whether the "direct effect" requirement of 28 U.S.C. §1605(a)(2) can be satisfied and foreign sovereigns can be sued in the United States when the ultimate place of performance of the foreign sovereign's contractual obligations are outside the United States. Both the District Court and the Tenth Circuit have read this Court's decision in *Weltover* to require that the foreign sovereign's place of performance must be in the United States for our courts to have jurisdiction under the FSIA. These decisions contradict the text of §1605 (a)(2) of the FSIA, unreasonably limit this Court's holding in *Weltover*, and are at odds with other federal case authorities. *See Ampac Group, Inc. v. Republic of Honduras*, 797 F.Supp. 973, 977 (S.D.Fla. 1992) (direct financial loss suffered by U.S. corporation in this country as a result of breach abroad was a "direct effect");

Walter Fuller Aircraft Sales, Inc. v. Republic of Philippines, 965 F.2d 1375, 1387 (5th Cir. 1992) (failure to convey good title to property abroad created liability in U.S. that was a "direct effect"); *Goodman Holdings v. Rafidain Bank*, 26 F.3d 1143, 1146-47 (D.C.Cir. 1994), Wald, J. concurring (pattern of foreign commercial activities that utilized U.S. banking system caused a "direct effect").

While the Tenth Circuit acknowledged that the Respondents' breach in this case did have an "effect" in the United States, the court reasoned that the effect was not sufficiently "direct" to provide a basis for jurisdiction, because the court found that "no part of the contract in this case was to be performed in the United States." *United World Trade, Inc.*, 33 F.3d at 1237. The Tenth Circuit misinterpreted *Weltover* and the FSIA to require that, in a commercial dispute an effect could only be "direct" if there was a breach of a provision of a contract which required performance by the foreign sovereign in the United States. The *Weltover* decision nowhere states this requirement and the FSIA expressly rejects it.

In *Weltover*, this Court recognized that "an effect is 'direct' if it follows 'as an immediate consequence of the defendants' . . . activity." *Weltover*, 112 S. Ct. at 2168. This Court rejected the test that an effect is "direct" only if it is "substantial" and "foreseeable", such as the case where a contract requires performance in this country and a breach would thus have a "foreseeable" impact here. *Id.* The contract in *Weltover* did not require performance in the United States, and gave the plaintiff a choice of performance in 4 different locales: London, Frankfort, Zurich or New York. 112 S. Ct. 2164. The plaintiff eventually chose New York as the place where the defendant was required to make payments; however,

the contract did not mandate that result. This Court focused on whether money which should have been delivered to a New York bank was not forthcoming, and not whether performance in the United States was required. It is undisputed that money which should have been converted into U.S. dollars and then distributed to UWT and Respondents by New York banks (with resulting commissions and fees to the bank) was not forthcoming. Thus, the "direct effect" in this case is not distinguishable from *Weltover*.

Moreover, both of the lower courts have flatly misinterpreted the FSIA in their attempts to focus on whether the Contract in question required performance by the Respondents in the United States. While the first two clauses of §1605(a)(2) of the FSIA do, indeed, require that the foreign sovereign have either engaged in a "commercial activity" or an "act" in the United States in order for there to be a waiver of sovereign immunity, the third clause of §1605(a)(2) contains no such prerequisite. Under that provision, sovereign immunity does not exist in any action based upon:

> . . . an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.

By its terms, this provision of the FSIA contemplates a situation where, although both the "commercial activity" and the "act" giving rise to the action will have occurred outside of this country, jurisdiction will be conferred upon our courts so long as the "act" causes a direct effect in the United States. UWT believes that this Court ruled in *Weltover* that the disruption of payments through banks in the United States

satisfied the "direct effect" requirement. If UWT's reading of *Weltover* is correct, then the decision of the Tenth Circuit is in error.

The United States Court of Appeals for the District of Columbia has recently had an opportunity to interpret *Weltover* and the "direct effect" language of §1605(a)(2) in light of a contract where the "place of performance" was wholly outside of the United States. *Goodman Holdings v. Rafidain Bank*, 26 F.3d 1143 (D.C.Cir. 1994). In *Goodman Holdings*, Goodman Holdings and its subsidiary, Anglo Irish Beef Processors International, sued to recover payments due on letters of credit issued in their favor by Rafidain Bank and Rasheed Bank, both of which are agencies of the Iraqi government. The district court dismissed the case for lack of subject matter jurisdiction on the ground that Rafidain was immune from suit under the FSIA.

Between March 1986 and January 1990, the Iraqi banks issued fourteen irrevocable letters of credit to pay for meat purchased from and delivered by several Irish beef producers to three corporations owned by the Iraqi government. Between November 1987 and July 1990, thirteen installments were paid on the letters, mostly from accounts in several United States banks. Once Iraq invaded Kuwait in August 1990, no additional payments were made to the Irish companies.

The D.C. Circuit held that Rafidain's failure to honor the letters of credit did not have an "immediate consequence" in the United States because:

> [n]either New York nor any other United States location was designated as the "place of

> performance" where money was "supposed" to have been paid by Rafidain or to Goodman. Rafidain might well have paid them from funds in United States banks but it might just as well have done so from accounts located outside of the United States, as it had apparently done before.

Id. at 1146-1147.

Circuit Judge Wald took issue with this narrow reading of the FSIA, and wrote a separate concurrence in which he emphasized:

> [F]or an act to have a "direct effect" in the United States, there is no prerequisite that the United States be contractually designated as the place of performance. If, for example, the letters of credit had specified that money must be funnelled to Ireland through the United States, a breach of the letters of credit would have had an "immediate consequence" in the United States: money that would have been transferred to Ireland would have remained in New York accounts. (citations omitted)
>
> Moreover, even absent a contractual provision mandating the involvement of U.S. banks, if the longstanding consistent customary practice between Rafidain and Goodman had been for Rafidain to pay Goodman from its New York accounts, the breach of the letters of credit

> might well have had a direct and immediate consequence in the United States.

Id. at 1147.

The facts outlined in this Petition illustrate a situation that will be repeated more and more in a world where U.S. companies deal increasingly with foreign sovereigns in transactions which frequently involve U.S. financial institutions. In the case at bar, the Contract, like many international agreements, required payment in U.S. dollars through a "European/USA Bank". The unrebutted testimony, supported by the Contract itself, established that the transaction between UWT and Respondents could only occur if the a U.S. bank was involved. The conversion of funds into dollars required a flow of funds from Sicily to London to New York to Denver and Paris. Once the Contract was breached, the flow of funds into the U.S. immediately ceased. UWT's damages, and the loss of fees to the New York banks, were caused directly by Respondents' breach, without an intervening event.

A "direct effect" was felt in the United States from the Respondents' breach of contract when the history of the parties' performance is analyzed using the parameters set out by Circuit Judge Wald in *Goodman*. It was UWT's and Respondents' customary practice to use the New York branch of the San Paolo Bank, as well as Citibank, New York, to convert the oil payments into U.S. dollars and to distribute those proceeds to the parties. Whether the Contract required use of the New York banks is not germane, because the parties actually employed the services of these banks over a period of time. As a result, money which should have come to the United States did not after the Respondents breached the Contract.

This case also has special importance because it poses a question that has not been addressed by the Court: whether sovereign immunity is waived under the FSIA where a U.S. company has to post security in this country in order to cover for a foreign sovereign's breach abroad? When Respondents failed to deliver the bill of lading for the third oil shipment, as they were required to do by the Contract, UWT was forced to defend title to the oil by posting a $6 million contractual indemnity in the U.S. This type of liability, incurred in an effort to defend Respondents' title to the oil, has been held to be a "direct effect" in the Fifth Circuit decision in *Fuller Aircraft*. UWT should not be forced to go to Kazakhstan to obtain compensation for this liability. The holding of the Tenth Circuit--that UWT's liability was not a "direct effect" of Respondents' in the United States which could be remedied through an action in our courts--conflicts with the view of the Fifth Circuit.

This Court should accept UWT's Petition for Writ of Certiorari and reverse the decision of the Tenth Circuit Court of Appeals because, while that decision purports to follow *Weltover* and the FSIA, the ruling of the Tenth Circuit Court of Appeals is an aberration.

CONCLUSION

Petitioner respectfully requests that a Writ of Certiorari be granted, that the decision of the Tenth Circuit Court of Appeals be reversed, and that the case be remanded to the United States District Court for the District of Colorado for further consideration of the issues which were raised by the Petitioner, but which were not decided due to that court's disposition of the case.

Respectfully submitted,

Phillip D. Barber
Terry Jo Epstein
DUFFORD & BROWN, P.C.
1700 Broadway, Suite 1700
Denver, CO 80290-1701
Telephone: 303/861-8013

Counsel for Petitioner
United World Trade, Inc.

DATED: November 23, 1994

In the United States Court of Appeals
for the Tenth Circuit

Case No. 93-1193

UNITED WORLD TRADE, INC.,
Plaintiff-Appellant,
v.
MANGYSHLAKNEFT OIL PRODUCTION ASSOCIATION, KAZAKHSTAN COMMERCE FOREIGN ECONOMIC ASSOCIATION, and MINISTRY OF ENERGY AND FUEL RESOURCES OF KAZAKHSTAN REPUBLIC,
Defendants-Appellees.

ORDER

Before Brorby and McWilliams, Circuit Judges, and Brown, District Judge.

WESLEY E. BROWN, District Judge

The issue in this case is whether the defendants are immune from the jurisdiction of the U.S. District Court under the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. § 1602 et seq. The district court held that the defendants were entitled to immunity and dismissed the complaint. 821 F.Supp. 1405.

Under the FSIA, foreign states are generally immune from the jurisdiction of the courts of the United States. 28 U.S.C. § 1604. (It is undisputed that the defendants are

"foreign states" within the meaning of FSIA.) One exception to this general rule is found in § 1605(a)(2), which provides in part that a foreign state shall not be immune from jurisdiction in cases in which the action is based "upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States." *Id.*

The claims in this case arose out of an overseas oil transaction. The district court determined that the alleged actions of the defendants in connection with the transaction did not have a direct effect in the United States. Accordingly, the court found that the exception set forth in § 1605(a)(2) had not been satisfied and concluded that it lacked jurisdiction. Plaintiff challenges this finding. For the reasons expressed herein, we conclude that the district court did not err in dismissing the complaint.[1]

I.

Because this case comes to us on review of a motion to dismiss the complaint, we assume that the allegations in the complaint are true. *Saudi Arabia v. Nelson*, 507 U.S. ___, 113 S.Ct. 1471, 123 L.Ed.2d 47 (1993). We note that, in keeping with the sound practice of resolving claims of immunity at the earliest possible stage of the case, the parties submitted affidavits and other materials outside the complaint to aid in the district court's determination of this issue. *Cf. Foremost-McKesson, Inc. v. Islamic Republic of Iran*, 905 F.2d

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[1]The district court also found that the defendants were entitled to dismissal of the complaint for other reasons. In light of our ruling on the immunity question, however, we need not address these other issues.

438, 449 (D.C.Cir. 1990). The complaint and the various materials submitted to the court disclose the following pertinent facts.

The plaintiff United World Trade, Inc. ("UWT"), is a corporation organized under the laws of Colorado with its principal place of business in Denver, Colorado. Defendant Mangyshlakneft Oil Production Association ("MOP") is an enterprise under the laws of the Republic of Kazakhstan and has authority to conduct oil production and export oil on behalf of the Republic.[2] The Kazakhstan Commerce Foreign Economic Association ("Kazcom") is an entity under the laws of Kazakhstan and acted as an agent for MOP in the transactions at issue in this case. The Ministry of Energy and Fuel Resources of Kazakhstan Republic is a ministry of the Kazakhstan government.

The plaintiff UWT entered into a "Protocol Agreement" with Kazcom and other parties on July 25, 1991, in Alma-Ata, Kazakhstan. In this document the parties expressed their interest in establishing a long-term relationship to refine and export raw materials, including crude oil, from Kazakhstan. Further negotiations were held in face-to-face meetings in Moscow and Alma-Ata. UWT also alleges that the defendants communicated with UWT in Denver via U.S. Mail, telephone

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[2]The defendant MOP was formerly subject to the control of the government of the Union of Soviet Socialist Republics. On December 16, 1991, the Republic of Kazakhstan became an independent sovereign state and MOP subsequently became subject to the jurisdiction and control of the Ministry of Energy and Fuel Resources of the Republic of Kazakhstan.

and fax machines, but UWT has not identified the substance of any such communications.

On December 17, 1991, representatives of UWT and defendants MOP and Kazcom met in Moscow and entered into a "Preliminary Agreement," which was "to serve as an umbrella for other contracts." In the Preliminary Agreement, UWT stated that it would provide a selection of potential buyers for Kazakhstan's "Buzachi" oil of up to one million metric tons per year and sell up to 200,000 metric tons of oil during the first quarter of 1992. Defendant MOP promised to hold negotiations with UWT and its prospective buyers, to provide up to 200,000 metric tons of oil in the first quarter of 1992 if a qualified buyer was found by UWT, and to provide an additional 800,000 metric tons of oil during the remainder of 1992. MOP promised that it would not circumvent UWT and deal directly with anyone UWT identified as a potential customer.

UWT successfully completed its obligation to present a refinery specializing in "Buzachi" oil that was acceptable to the defendants--namely, an Italian company in Sicily called "ISAB." On January 23, 1992, UWT, MOP and Kazcom entered into an agreement in Moscow entitled "Contract for Sale of Crude Oil." Under the contract, MOP as the seller was required to supply UWT with 200,000 metric tons of oil during January, February and March, 1992. UWT was to pay MOP 97% of the price paid by UWT's customer, ISAB. The method of payment to MOP was set forth in the contract:

> In U.S. Dollars by irrevocable documentary credit opened by a first class European/USA bank and notified through

advising bank, with payment for seller's account at thirty (30) calendar days from B/L date against presentation of commercial invoice and other usual shipping documents at bank counters. Letter of credit to be opened before loading.

Latest day for documents/LOI presentation 10.00 hrs. A.M. Italian time of three (3) working days prior to payment date, otherwise payment will be effected three (3) working days after the presentation of documents/LOI.

* * * * * * *

Payment falling due on Sunday or Monday banking holiday in New York shall be made on the first following banking day. Payment falling due on Saturday or any other banking holiday in New York shall be made on the preceding banking day. All bank commissions and sundry charges outside buyer's bank are for seller's account.

Pursuant to the contract, MOP transported 200,000 metric tons of oil from inside Kazakhstan to Novorossyisk on the Black Sea. The oil was then to be shipped in four tanker shipments to ISAB's refinery in Sicily. Before each delivery, the London Branch of the San Paolo Bank--the bank selected by UWT pursuant to the contract--issued a letter of credit sufficient to cover payment in favor of MOP and notified MOP in Alma-Ata. Upon notification, MOP shipped the oil. After

delivery to ISAB, MOP sent the shipping documents to the London Branch of the San Paolo Bank, which made payment in favor of MOP to MOP's account with Credit Commercial de France bank in Paris.

The first two shipments of oil went smoothly. The bill of lading for the third shipment was apparently stolen from a Kazcom representative. The missing bill of lading created potential liability for ISAB, the ultimate buyer of the oil, and ISAB initially refused to release payment to UWT for the third shipment. UWT contends that it ultimately secured release of payment from ISAB by issuing a guaranty to indemnify ISAB against third party claims. According to UWT, the defendants refused after the third shipment to supply any additional oil to UWT and began selling oil directly to ISAB. UWT then filed this action in the U.S. District Court for the District of Colorado, asserting four claims: breach of contract, anticipatory repudiation of the contract, fraud and misrepresentation, and consequential damages.

II.

The Foreign Sovereign Immunities Act "provides the sole basis for obtaining jurisdiction over a foreign state in the courts of this country." *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 443, 109 S.Ct. 683, 693, 102 L.Ed.2d 818 (1989). "Under the Act, a foreign state is presumptively immune from the jurisdiction of United States courts; unless a specified exception applies, a federal court lacks subject matter jurisdiction over a claim against a foreign state." *Saudi Arabia v. Nelson*, 507 U.S. ___, 113 S.Ct. 1471, 123 L.Ed.2d 47 (1993). The exception relied upon by the plaintiff in this case provides that a foreign state is not immune

from suit in any case "in which the action is based . . . upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States." § 1605(a)(2). The only disputed issue here is whether the defendants' actions caused a "direct effect" in the United States.

The "direct effect" exception was addressed by the Supreme Court in *Republic of Weltover*, ___ U.S. ___, 112 S.Ct. 2160, 119 L.Ed.2d 394 (1992). In *Weltover*, the plaintiffs were holders of certain Argentinean bonds. The bonds called for Argentina to make payment of principal and interest to bondholders in U.S. dollars. Payment could be made through transfer on the London, Frankfurt, Zurich or New York market, at the election of the creditor. When the bonds began to mature, Argentina unilaterally extended the time for payment and offered bondholders substitute instruments. The plaintiffs, two Panamanian corporations and a Swiss bank, refused to accept the rescheduling and insisted on full payment, specifying New York as the place where payment should be made. The plaintiffs then brought suit in the U.S. District Court, alleging that Argentina's failure to pay the bonds according to the original terms was a breach of contract. Jurisdiction was alleged under § 1605(a)(2) of the FSIA. The plaintiffs argued that Argentina's refusal to make payment caused a "direct effect" in the U.S. because payment that was supposed to have been made in New York was not made. The Supreme Court agreed. The Court rejected an argument that an effect could not be considered "direct" unless it was both "substantial" and "foreseeable." (These requirements had previously been adopted by several circuit courts.) An effect is direct, the Court stated, "if it follows 'as an immediate consequence of the defendant's . . . activity.'" ___ U.S. at ____,

112 S.Ct. at 2168, 119 L.Ed.2d at 407. After noting that the plaintiffs had designated their accounts in New York as the place of payment, the Court concluded: "Because New York was thus the place of performance for Argentina's ultimate contractual obligations, the rescheduling of those obligations necessarily had a 'direct effect' in the United States: Money that was supposed to have been delivered to a New York bank for deposit was not forthcoming." *Id.*

In the instant case, appellant points out that its contract with MOP required payment in U.S. dollars through a "European/USA Bank." As a result of this provision, appellant contends, a United States bank necessarily had to be involved in the payment process. Appellant alleges that payment in U.S. dollars could only be accomplished by having the proceeds of the sale of defendants' oil transferred from a European bank to a United States bank for conversion of the proceeds into U.S. dollars. This is precisely what happened, appellant contends, with respect to the first two shipments of oil. The refiner ISAB forwarded payment for those shipments to the London Branch of the San Paolo Bank--which had been selected by UWT as the "European/USA Bank" specified in the contract. The San Paolo Bank then transferred the funds to its New York branch, which in turn transferred the funds through CitiBank of New York to be converted into U.S. dollars. the defendants' share of the proceeds was then credited to the defendants' account with a bank in Paris and UWT's share was transferred to its account in Denver.

Appellant's brief identifies several alleged "direct effects" that were brought about by MOP's refusal to supply any more oil under the contract. Foremost of these appears to be the fact that no additional oil proceeds were transferred to

the United States for conversion into U.S. dollars. Appellant notes that CitiBank of New York did not receive a commission for the conversion of funds that it otherwise would have obtained. Appellant's losses in connection with providing ISAB a contractual guarantee are also cited by appellant as a direct effect of the defendants' actions. Additionally, appellant alleges that UWT suffered financial loss in the United States in the form of lost profits as a result of defendants' actions.[3]

III.

At the outset, we must concede that we have struggled to identify objective standards that would aid in determining what does and does not qualify as a "direct effect in the United States." The phrase itself seems hopelessly ambiguous when applied to any particular transaction. The guideposts previously adopted by many courts--the requirement that a direct effect be both "substantial" and "foreseeable"--was expressly rejected by the Supreme Court in *Weltover*. As a result, we are left to determine what qualifies as a direct effect largely from the Supreme Court's example in applying the statute to the facts before it in *Weltover*.

We have no doubt that the circumstances pointed to by appellant--such as the absence of a transfer and conversion of currency in the U.S., as well as the loss of profits and other harm to UWT--could reasonably be said to be "effects" caused by the defendants' actions. Such circumstances can be traced to the defendants' alleged act of refusing to deliver oil under the

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[3]To the extent appellant's brief identifies any alleged "effects" other than those set forth above, we conclude that they do not meet the requirements of § 1605(a)(2).

contract. We agree with the district court, however, that the defendants' actions in connection with the sale of oil to UWT cannot be said to have caused a direct effect in the United States.

The circumstances surrounding the transfer and conversion of currency in the United States is not a "direct" effect that would provide a basis for jurisdiction. Appellant attempts to cast this case in the image of *Weltover*, arguing that in both cases money that was supposed to have been forthcoming to the United States was not transferred here because of the defendants' actions. But the instant case differs in a significant respect from *Weltover*: no part of the contract in this case was to be performed in the United States. Under the contract, MOP was obligated to transfer oil from Kazakhstan to Sicily. No part of MOP's performance was to take place in the United States. Unlike *Weltover*, the defendants' performance of their contractual obligations had no connection at all with the United States. *Cf. Weltover*, ___ U.S. at ___, 112 S.Ct. at 2168-69, 119 L.Ed.2d at 408 ("Because New York was thus the place of performance for Argentina's ultimate contractual obligations, the rescheduling of those obligations necessarily had a 'direct effect' in the United States . . . .").

Contrary to appellant's argument, the payment provision of its contract with MOP does not provide a basis for finding that the defendants' activity had a "direct effect" in the United States. Pursuant to that provision, UWT was to make payment for the oil to MOP's bank in Paris. Thus, Paris was specified as the place of performance for UWT's contractual obligation. Appellant relies on the contractual provision stating that payment was to be made "in U.S. Dollars" by a letter of credit

issued by a first class "European/USA Bank." We cannot agree that appellant's efforts to convert the funds into U.S. dollars, even if this meant that at some point a United States bank had to be involved, was a direct effect of the defendants' activity. An effect is "direct" if it follows as "an immediate consequence of the defendant's activity." *Weltover*, ___ U.S. at ____, 112 S.Ct. at 2168, 119 L.Ed.2d at 407. the entire series of banking transactions that led to the conversion of the funds into dollars--from Sicily to London to New York to Paris--cannot be considered an "immediate consequence of the defendant's activity" under any common sense reading of that phrase. The requirement that an effect be "direct" indicates that Congress did not intend to provide jurisdiction whenever the ripples caused by an overseas transaction manage eventually to reach the shores of the United States.[4] Such is the case here. The banking transfers referred to by UWT were only tangentially related to the performance of the parties contractual obligations--all of which were to take place outside of the United States. *See Antares Aircraft, L.P. v. Federal Republic of Nigeria*, 999 F.2d 33, 36 (2nd Cir. 1993). Certainly

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[4]Appellant argues that we must interpret § 1605(a)(2) in light of the Congressional purpose of ensuring access of U.S. citizens to the courts. *Citing Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 490, 103 S.Ct. 1962, 1969-70, 76 L.Ed.2d 81, 90 (1983). While it is true that the FSIA was passed with such a purpose in mind, Congress was also concerned that "our courts [might be] turned into small 'international courts of claims[,]' . . . open . . . to all comers to litigate any dispute which any private party might have with a foreign state anywhere in the world." *Id.* Congress protected against this danger "by enacting substantive provisions requiring some form of substantial contact with the United States." *Id.* Our task is to determine from a reading of the plain language of the statute whether the requirements of § 1605(a)(2) have been met.

Weltover does not stand for the proposition that any involvement in a commercial transaction by a United States bank means that a defendant's activity has had a "direct effect" in the United States. *Cf. Antares Aircraft*, 999 F.2d at 36. ("Unlike *Weltover*, where the parties had agreed that performance was to occur in New York, the sole act connected to the United States in this instant matter, the drawing of a check on a bank in New York, was entirely fortuitous and entirely unrelated to the liability of the appellees.") The performance of this contract was to take place entirely in Europe. The process by which UWT obtained an exchange of currency in the United States is simply too attenuated from the defendants' actions to be considered a "direct effect."

The defendants' failure to provide a bill of lading to ISAB in Sicily likewise did not have a direct effect in the United States. Appellant states that it obtained release of payment for the third shipment of oil by issuing a contractual guarantee to indemnify ISAB and asserts that it incurred expenses and potential liability in the United States in connection with the guarantee. Appellant's activities and asserted losses in connection with the guarantee, however, derive from UWT's contractual relationship with ISAB, not from its contract with the defendants. We agree with the district court that UWT's efforts to provide a guarantee to ISAB were dependent on an intervening factor--UWT's contractual arrangement with ISAB--that prevents those efforts from being considered "immediate consequences" of the defendants' actions. Such acts are analogous to the type of unilateral activity that the Supreme Court has found to be an insufficient basis for the exercise of jurisdiction under the Due Process Clause of the Fourteenth Amendment. *See e.g., Burger King*

Corp. v. Rudzewicz, 471 U.S. 462, 475, 105 S.Ct. 2174, 2184, 85 L.Ed.2d 528 (1985).

Finally, we must conclude that UWT's allegation that it lost profits and suffered other harm in the United States as a result of defendants' actions does not meet the requirements of § 1605(a)(2). The immediate consequence of MOP's alleged breach of contract and fraud was that UWT did not receive funds from ISAB at the San Paolo Bank in London. Although the loss of these funds could be characterized as a "direct effect" of the defendants' act, we conclude that the direct effect cannot be characterized as occurring "in the United States." We recognize the amorphous nature of the issue before us. The attempt to locate the site of financial harm to a corporation, particularly where the cause of the injury is an omission, has been described by one court as "an enterprise fraught with artifice." *See Texas Trading & Milling Corp. v. Federal Republic of Nigeria*, 647 F.2d 300, 312 (2nd Cir. 1981), *cert. denied*, 454 U.S. 1148, 102 S.Ct. 1012, 71 L.Ed.2d 301 (1982). The Second Circuit, in a decision subsequently affirmed by the Supreme Court, noted that courts "often look to the place where legally significant acts giving rise to the claim occurred" in determining the place where a direct effect may be said to be located. *Weltover, Inc. v. Republic of Argentina*, 941 F.2d 145, 152 (2nd Cir. 1991), *Cf. Weltover*, ___ U.S. at ___, 112 S.Ct. at 2168-69, 119 L.Ed.2d at 408. *See also General Elec. Capital Corp. v. Grossman*, 991 F.2d 1376, 1385 (8th Cir. 1993). The basis or foundation of the action in this case was a contract entered into by the parties in Moscow. The contract called for the defendants to deliver oil from Kazakhstan to Sicily. When UWT's purchaser, ISAB, received oil shipments from the defendants it forwarded payment to UWT in London. *Cf. Texas Trading*, 647 F.2d at 312 (the financial loss occurred

in the United States because the defendant's breach of contract prevented the plaintiffs, American corporations, from collecting money in the United States.)[5] UWT was then obligated under the terms of the contract to make payment to MOP in Paris. When all of the facts are examined together in this case, including the "legally significant acts," we are compelled to find that the direct effect of the defendants' alleged acts occurred in Europe rather than in the United States. The fact that UWT, had it received additional funds in London pursuant to the contract, would have then transferred those funds to the United States does not allow us to conclude that the loss suffered by appellant was sufficiently "in the United States" to warrant jurisdiction under § 1605(a)(2). *Cf. Zedan v. Kingdom of Saudi Arabia*, 849 F.2d 1511, 1515 (D.C.Cir. 1988) ("Appellant's injury, while financial rather than personal, was definitely suffered in Saudi Arabia, for it was there that the Ministry . . . breached its contract with him. * * * [T]he breach's effect in the United States cannot said to be direct, for this effect is due to an intervening event--appellant's return

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[5]Appellant cites *Texas Trading* for the proposition that "any failure to make payments to an American corporation creates a direct effect 'in' the United States." App.Br. at 12. This is clearly an overstatement of the *Texas Trading* opinion. The Second Circuit based its conclusion that a direct effect in the United States had been shown on two facts, the first of which was that in keeping with the contract in that case the plaintiffs "were to present documents and collect money *in the United States*." *Texas Trading*, 647 F.2d at 312 (emphasis added). the court specifically noted that "[w]hether a failure to pay . . . an American corporation overseas creates an effect 'in the United States' under § 1605(a)(2) is not before us." *Id.*

here.").[6] *See also Commercial Bank of Kuwait v. Rafidain Bank*, 15 F.3d 238, 241 (2nd Cir. 1994) (Foreign state's failure to remit funds in New York, as they were contractually bound to do, had a direct effect in the United States.) Nor is the fact that UWT is an American corporation that suffered a financial loss sufficient to place the direct effect of the defendants' actions "in the United States." Appellant would have us interpret § 1605(a)(2) in a manner that would give the district courts jurisdiction over virtually any suit arising out of an overseas transaction in which an American citizen claims to have suffered a loss from the acts of a foreign state. We think that the language of § 1605(a)(2) limiting jurisdiction to cases where there is a "*direct* effect" in the United States makes it unlikely that this was Congress' intent.

IV.

The allegations set forth by appellant do not demonstrate that the defendants' actions caused "a direct effect in the United States" within the meaning of 28 U.S.C. § 1605(a)(2). The judgment of the district court is therefore AFFIRMED.[7]

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[6]We recognize that *Zedan* is no longer "good law" insofar as it interpreted § 1605(a)(2) as requiring a "substantial" and "foreseeable" effect. In our view , however, the above quoted passage is consistent with the Supreme Court's *Weltover* opinion.

[7]Plaintiff's motion to supplement oral argument is denied.

United States District Court
for the District of Colorado

Civil Action No. 92-S-1917

UNITED WORLD TRADE, INC.,
Plaintiff,
v.
MANGYSHLAKNEFT OIL PRODUCTION ASSOCIATION, KAZAKHSTAN COMMERCE FOREIGN ECONOMIC ASSOCIATION, and MINISTRY OF ENERGY AND FUEL RESOURCES OF KAZAKHSTAN REPUBLIC,
Defendants.

MEMORANDUM OPINION AND ORDER

THIS MATTER came before the court for hearing on the Defendants' Motion to Dismiss for Lack of Subject Matter Jurisdiction, Lack of Personal Jurisdiction, and Improper Venue. Also pending are: (1) the Defendants' Motion to Strike Newspaper Articles and Other Hearsay; and (2) the Plaintiff's Motion to Strike. The court, having reviewed the motions, the exhibits, the affidavits, the entire case file, the responses, the replies, the supplements, the surreply, the arguments made by counsel in open court, and the applicable law and being fully advised in the premises, makes the following Findings, Conclusions and Order.

1. The Claims

This case involves several written agreements: (1) the Protocol Agreement between United World Trade, Inc. (UWT) and representatives of the Defendants, signed on July 25, 1991 in Almaty (Alma-Ata), Kazakhstan (Exhibit A to Plaintiff's Memorandum in Opposition to Defendants' Motion to Dismiss); (2) the Preliminary Agreement between UWT and the Defendants, signed on December 17, 1991 in Moscow (Exhibit B to Plaintiff's Memorandum in Opposition to Defendants' Motion to Dismiss); and (3) the Contract for Sale of Crude Oil between UWT, Defendant Mangyshlakneft Oil Production Association (MOP), and Defendant Kazakhstan Commerce Foreign Economic Association (KCFEA), signed on January 23, 1992 in Moscow (Exhibit E to Plaintiff's Memorandum in Opposition to Defendants' Motion to Dismiss). The Protocol Agreement is not at issue. The Preliminary Agreement is the subject of the First Amended Complaint. The Preliminary Agreement "was to serve as an umbrella for other contracts." (First Amended Complaint, ¶7). The First Amended Complaint alleges breach of the Preliminary Agreement, asserting four claims for relief against the Defendants: (1) breach of the Preliminary Agreement; (2) anticipatory repudiation of the Preliminary Agreement; (3) fraud and misrepresentation in entering into the Preliminary Agreement; and (4) consequential damages incurred because of the Defendants' failure to perform their obligations under the Preliminary Agreement. The First Amended Complaint also mentions the Contract for Sale of Crude Oil, but does not specifically allege a breach of that Contract.

2. Factual Background

Pursuant to the Contract for Sale of Crude Oil, MOP delivered oil in four shipments to UWT in Novorossiysk. The oil was then sent to an Italian company (ISAB) in Sicily for refining. ISAB sent payment for the oil to UWT's account at the London branch of the San Paolo Bank. UWT paid MOP for the oil by posting an irrevocable Letter of Credit in favor of MOP with the London branch of the San Paolo Bank. In accordance with the Letter of Credit and upon presentation of a bill of lading, the London branch of the San Paolo Bank transferred payment to an account belonging to an agent of MOP in Paris, France. The proceeds of the Letter of Credit were disbursed to the parties in U.S. dollars.

The bill of lading for the third of the four shipments of oil was apparently stolen from a KCFEA representative. The missing bill of lading created potential liability for ISAB. UWT asserts that the failure to deliver the original bill of lading forced UWT to issue a contractual guarantee to indemnify ISAB for six years for six million dollars. After the third shipment of oil, the Defendants allegedly refused to supply any additional oil to UWT, resulting in this lawsuit for breach of the Preliminary Agreement.

3. Subject Matter Jurisdiction

It is undisputed that 28 U.S.C. § 1130(a), in conjunction with the Foreign Sovereign Immunities Act (FSIA), 28 U.S.C. § 1602 *et seq.*, provides the only basis for subject matter jurisdiction over an action against a foreign state. Under the FSIA, foreign states and their agencies and instrumentalities are immune from suit in the courts of the United States except as

otherwise provided by the Act. Pursuant to 28 U.S.C. § 1604, "a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 and 1607 of this chapter." Failure to satisfy the statute's exceptions deprives the district court of subject matter jurisdiction. *Walter Fuller Aircraft Sales, Inc. v. Republic of the Philippines*, 965 F.2d 1375, 1383 (5th Cir. 1992) (citations omitted). The foreign state always has the burden of persuasion on immunity. Once the foreign state makes a prima facie showing of immunity, the plaintiff seeking to litigate in the United States has the burden of coming forward with facts showing that an exception applies. *Walter Fuller Aircraft Sales*, 965 F.2d at 1383.

It is also undisputed that the Defendants all meet the definition of "foreign states" for the purposes of jurisdiction under 28 U.S.C. § 1602 *et seq.* Defendant MOP is a state organization of industrial enterprises that is wholly owned by the Republic of Kazakhstan. Defendant KCFEA was established by decree of the Council of Ministers of the former U.S.S.R. and is now an instrumentality of and wholly owned by the Republic of Kazakhstan. Defendant Ministry of Energy and Fuel Resources of the Republic of Kazakhstan was established by decree of the President of the Republic of Kazakhstan and is an executive and administrative body of the Republic of Kazakhstan.

The Defendants assert that, as "foreign states," they are immune from this court's jurisdiction. UWT argues that the Defendants are subject to the exception to jurisdictional immunity of a foreign state set forth in 28 U.S.C. § 1605(a)(2) because this civil action is based "upon an act outside the territory of the United States in connection with a commercial

activity of the foreign state elsewhere and that act cause[d] a direct effect in the United States." The Defendants concede that they were engaged in commercial activity with UWT, but deny that this commercial activity caused "a direct effect in the United States." Thus, the court must determine whether the alleged actions of the Defendants satisfy the "direct effect" requirement of the FSIA.

Before *Republic of Argentina v. Weltover, Inc.*, ___ U.S. ___, ___, 112 S.Ct. 2160, 2168, 119 L.Ed.2d 394 (1992), the circuits were split as to whether the "direct effect" must be both "substantial" and "foreseeable", as suggested by the legislative history of the FSIA. *See International Housing, Ltd., v. Rafidain Bank Iraq,* 893 F.2d 8, 11 (2d Cir. 1989); *America West Airlines, Inc. v. GPA Group, Ltd.*, 877 F.2d 793, 798-99 (9th Cir. 1989); *Rush-Presbyterian-St. Luke's Medical Center v. Hellenic Republic*, 877 f.2d 574, 581-82 (7th Cir.), *cert. denied*, 493 U.S. 937, 110 S.Ct. 333, 107 L.Ed.2d 322 (1989); *Gould, Inc. v. Pechiney Ugine Kuhlmann*, 853 F.2d 445, 453 (6th Cir. 1988); *Zedan v. Kingdom of Saudi Arabia*, 849 F.2d 1511, 1514 (D.C.Cir. 1988); *Zernicek v. Brown & Root, Inc.*, 826 F.2d 415, 417-18 (5th Cir. 1987), *cert. denied*, 484 U.S. 1043, 108 S.Ct. 775, 98 L.Ed.2d 862 (1988). The Supreme Court in *Weltover* rejected "the suggestion that § 1605(a)(2) contains any unexpressed requirement of 'substantiality' or 'foreseeability.'" ___ U.S. at ___, 112 S.Ct. at 2168. The Court indicated that "an effect is 'direct' if it follows 'as an immediate consequence of the defendant's . . . activity'." ___ U.S. at ___, 112 S.Ct. at 2168.

Relying primarily on *Weltover*, ___ U.S. at ____, 112 S.Ct. at 2168 and *Ampac Group, Inc. v. Republic of Honduras*, 797 F.Supp. 973, 977 (S.D.Fla. 1992), UWT argues that the

"direct effect" in the United States need only be slight. In *Weltover*, the Supreme Court conceded that Argentina's unilateral rescheduling of the maturity dates on certain bonds had a "direct effect" in the United States. ___ U.S. at ___, 112 S.Ct. at 2168-69. The Court noted that, because New York had been designated the place for performance of Argentina's ultimate contractual obligations, the rescheduling of those contractual obligations necessarily had a "direct effect" in the United States. UWT would have this court apply the same reasoning that was applied in *Ampac*, 797 F.Supp. at 977, that

> *Weltover* therefore teaches that the effect in the United States need only be slight. Although the effect cannot be speculative, the contact with the United States may indeed be only a tangential one to support jurisdiction under the FSIA.

UWT argues that the terms of the Contract for Sale of Crude Oil satisfy the "direct effect" requirement for subject matter jurisdiction under § 1605(a)(2) because the Contract for Sale of Crude Oil called for payment in U.S. dollars, requiring a currency exchange transaction in the United States. UWT also argues that the "direct effect" requirement for subject matter jurisdiction under § 1605(a)(2) is satisfied because UWT has suffered a loss in the form of having to issue a contractual guarantee to indemnify ISAB for a term of six years for six million dollars, a loss of goodwill in the Denver business community and abroad, the loss of a relationship with ISAB, and a direct financial loss of income and profits to its Denver office.

First, this court does not agree with the reasoning in *Ampac*, 797 F.Supp. at 977, that *Weltover*, ___ U.S. at ____, 112 S.Ct. at 2168, can be interpreted to mean that "the effect in the United States need only be slight." "[A]n effect is 'direct' if it follows 'as an immediate consequence of the defendant's . . . activity.'" *Weltover*, ___ U.S. at ___, 112 S.Ct. at 2168, does not invalidate the reasoning applied in previous cases. See *Four Corners Helicopters, Inc. v. Turbomeca S.A.*, 677 F.Supp. 1096, 1100-02 (D.Colo. 1988) ("[T]he focus is not on the nature of the injury sustained, but instead on the strength of the nexus between the allegedly unlawful activity and the United States."); *Colonial Bank v. CGMF*, 645 F.Supp. 1457, 1465 (S.D.N.Y. 1986) ("To extend jurisdiction to claims brought by all persons indirectly injured by commercial acts of foreign states would subject them to the jurisdiction of the United States courts in an enormously expanded number of cases."); *Upton v. Empire of Iran*, 459 F.Supp. 264, 266 (D.C.C. 1978), *aff'd.*, 607 F.2d 494 (D.Cir. 1979) ("The commonsense interpretation of a 'direct effect' is one which has no intervening element, but, rather, flows in a straight line without deviation or interruption.").

Second, although the "direct effect" clause of § 1605(a)(2) has been construed to provide subject matter jurisdiction over breach of contract claims where plaintiffs were U.S. citizens or corporations *and* where the contracts provided for payments to be made in the United States, "mere financial loss suffered b a plaintiff in the United States as a result of the action abroad of a foreign state does not constitute a 'direct effect' and therefore cannot by itself create subject matter jurisdiction under section 1605(a)(2)." *Gregorian v. Izvestia*, 871 F.2d 1515, 1527 (9th Cir.), *cert. denied*, 493 U.S. 891, 110 S.Ct. 237, 107 L.Ed.2d 188 (1989) (citations omitted)

(emphasis in original). A plaintiff must establish that "something legally significant actually happened in the U.S." for FSIA jurisdiction to attach. *Zedan*, 849 F.2d at 1515.

The Preliminary Agreement that is the subject of the entire First Amended Complaint has virtually no connection with the United States. The Preliminary Agreement was signed in Moscow and memorialized UWT's plan to act as a broker in sales of oil by MOP to qualified buyers. The Preliminary Agreement contains no reference to the United States and no act contemplated under the Preliminary Agreement would have or did cause a "direct effect" in the United States. Nor did the alleged breach of the Preliminary Agreement for which UWT seeks relief cause any "direct effect" in the United States.

The only mention of the United States in the Contract for Sale of Crude Oil is in reference to a "first class European/USA bank" and to procedures to be followed in the event a payment was due on a banking holiday in New York. The terms of the Contract for Sale of Crude Oil did not cause any "direct effect" in the United States. The act of delivering the oil from Kazakhstan to Sicily had no "direct effect" in the United States. Aside from the transfer of funds after the commercial activity in this case occurred outside the boundaries of the United States. There was no connection with the United States in the purchase of, sale of, delivery of, or payment for the oil. The terms of the Contract for Sale of Crude Oil did not require any payments to be made in the United States. Although the currency exchange was done through a New York bank, the method of monetary conversion was not required by ãny term of the Contract for Sale of Crude Oil. the Contract for Sale of Crude Oil did not contain any mention of the method of payment of UWT's commission.

Those financial transactions were governed by UWT's separate agreement with ISAB. UWT's contract with ISAB is not before the court. The damages UWT complains of, including the alleged guarantee to indemnify ISAB for a term of six years, derive from UWT's contractual relationship with ISAB, not from the Contract for Sale of Crude Oil between UWT, MOP, and KCFEA. UWT's alleged losses are consequential, not direct.

The court concludes that the losses allegedly suffered by UWT as a result of the Defendants' actions abroad are not "legally significant" in the context of the First Amended Complaint, see *Zedan*, 849 F.2d at 1515, and do not constitute a "direct effect" in the United States, see *Gregorian*, 871 F.2d at 1527. The nexus between the allegedly unlawful activity and the United States is not sufficient. See *Four Corners Helicopters*, 677 F.Supp. at 1100-02. The financial loss in the United States does not flow "in a straight line" from the alleged actions of the Defendants. See *Upton*, 459 F.Supp. at 266. The allegations that UWT makes are too remote to have caused a "direct effect" in the United States pursuant to § 1605(a)(2). UWT cannot satisfy the "direct effect" exception to overcome the immunity of foreign states and their agencies and instrumentalities from suit in the courts of the United States. 28 U.S.C. § 1604. This court is therefore deprived of subject matter jurisdiction.

4. Personal Jurisdiction

Personal jurisdiction under the FSIA is determined by resorting to the traditional minimum contacts test. *Richmark Corp. v. Timber Falling Consultants, Inc.*, 937 F.2d 1444, 1446-47 (9th Cir. 1991), *cert. denied*, ___ U.S. ___, 113 S.Ct.

295, 121 L.Ed.2d 219 (1992), citing *Gregorian*, 871 F.2d at 1529. A court may assert general personal jurisdiction if a non-resident defendant has "substantial" or "continuous and systematic" contacts with the forum state. *Richmark*, 937 F.2d at 1446-47, citing *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414-16 and 414 n. 9, 104 S.Ct. 1868, 1872-73 and 1872 n. 9, 80 L.Ed.2d 404 (1984). Where service is made under FSIA § 1608, the relevant area in delineating contacts is the entire United States, not merely the forum state. *Richmark*, 937 F.2d at 1446-47 (citations omitted).

Because the court has determined above that it does not have subject matter jurisdiction over this civil action, the court need not reach the issues of personal jurisdiction over the Defendants. However, the court notes that UWT's alleged basis for personal jurisdiction is tenuous at best. With or without considering the affidavits addressed by the respective motions to strike, the court considers the alleged contacts between the Defendants and the United States insufficient to support the exercise of personal jurisdiction over the Defendants.

5. Venue

Because the court has determined that it does not have subject matter jurisdiction over this civil action, the court need not reach the issue of improper venue. However, the court notes that venue would not be proper in this judicial district under 28 U.S.C. § 1391(f)(1) or (f)(2) because there is no adequate showing that a substantial part of the events giving rise to the claim occurred in this judicial district or that the Defendants were licensed to do business or were doing business in this judicial district. The court does not address the doctrine of forum *non conveniens* or whether venue may have

been proper in the District of Columbia under 28 U.S.C. § 1391(f)(4).

Accordingly, IT IS ORDERED:

1. The Defendants' Motion to Dismiss for Lack of Subject Matter Jurisdiction, Lack of Personal Jurisdiction, and Improper Venue is GRANTED.

2. The Defendants' Motion to Strike Newspaper Articles and Other Hearsay is DENIED as moot.

3. The Plaintiff's Motion to Strike is DENIED as moot.

4. This civil action is DISMISSED. Each party is to bear his, her, or its own attorney fees and costs.

(2)

Supreme Court, U.S.
FILED
DEC 22 1994
OFFICE OF THE CLERK

No. 94-942

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1994

UNITED WORLD TRADE, INC.,
Petitioner,

vs.

MANGYSHLAKNEFT OIL PRODUCTION ASSOCIATION, KAZAKHSTAN COMMERCE FOREIGN ECONOMIC ASSOCIATION, and MINISTRY OF ENERGY AND FUEL RESOURCES OF KAZAKHSTAN REPUBLIC,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

Gordon G. Greiner
Counsel of Record
Davis O. O'Connor
Elizabeth A. Phelan
Holland & Hart
555 17th Street, Suite 2900
P.O. Box 8749
Denver, CO 80201-8749
Telephone: (303) 295-8000
Attorneys for Respondents

December 22, 1994

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QUESTION PRESENTED FOR REVIEW

In respondents' view, the question sought to be presented by petitioner, correctly restated with respect to this record is as follows:

1. Whether federal district courts have subject matter jurisdiction over a dispute arising from a foreign sovereign's alleged breach of contract where (a) the plaintiff buyer is a United States corporation but the contract did not require performance by either party in the United States; (b) payment was made in U.S. dollars by buyer's foreign bank in London to the foreign sovereign in Paris; and (c) the sole effect in the United States of the alleged breach is that a non-party U.S. bank will not receive commissions for converting contractual payments from foreign to United States currency?

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INTRODUCTION

Under the Foreign Sovereign Immunities Act ("FSIA"), a foreign sovereign forfeits its presumed immunity and United States courts have subject matter jurisdiction if the claim for relief is based on an act of the sovereign outside of the United States "in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States." 28 U.S.C.A. § 1605(a)(2) (1994).

The petition argues that the required "direct effect in the United States" exists when the commercial transaction at issue requires payment to the sovereign in U.S. dollars, even though the dollars paid are transmitted from buyer's non-U.S. bank in London to seller's non-U.S. bank in Paris. The only "effect" upon which this significant expansion of subject matter jurisdiction depends is the loss -- by a U.S. bank which is not a party to the contract and which is selected by buyer's London bank -- of commissions that buyer (petitioner) would otherwise pay for converting buyer's foreign funds into U.S. dollars for ultimate payment to the sovereign overseas.

No conflict exists among the circuits, for no circuit court has made a finding of direct effect based upon such an attenuated connection between the breach and its alleged consequences in the United States. Nor is there any need for this Court to revisit Republic of Argentina v. Weltover, Inc., 112 S. Ct. 2160 (1992). The court of appeals properly adhered to and correctly applied Weltover's interpretation of the direct effect requirement. In essence, petitioner seeks appellate review of the court of appeals application of Weltover, a wholly inadequate basis for certiorari review.

The petition also seeks review on grounds that petitioner allegedly was required to give its Italian purchaser a contractual guaranty as a result of petitioner's failure to perform under its contract with the purchaser. Pet. at i, Question 3; id. at 15. In fact, petitioner's purchaser rejected petitioner's proffered guaranty and insisted on receiving security from one of the respondents. Because there is no factual predicate for petitioner's third question, it furnishes no basis for certiorari review.

STATEMENT OF THE CASE

A. Factual Background.

On December 16, 1991, the Republic of Kazakhstan became a sovereign state, independent of the Union of Soviet Socialist Republics. Two of the respondents, the Mangyshlakneft Oil Production Association ("MOP") and Kazakhstan Commerce Foreign Economic Association ("Kazcom" or "KCFEA"), which were instrumentalities of the Soviet government, survived the transition. The third respondent, the Ministry of Energy and Fuel Resources of the Republic of Kazakhstan ("Ministry") did not come into existence until February 7, 1992, after the agreements at issue had been negotiated and executed, and performance had commenced. It is undisputed that each of the respondents is an agency, instrumentality, or political subdivision of the Republic of Kazakhstan, and is entitled to sovereign immunity under the FSIA, 28 U.S.C.A. §§ 1603(a) and (b) (1994).

B. UWT's Claims.

Petitioner UWT's claims arose from MOP's alleged breach of two separate contracts between UWT and certain of the respondents.[1]

1. MOP's Alleged Breach Of The Preliminary Agreement.

The Preliminary Agreement, between UWT, MOP and Kazcom, was the basis for UWT's first claim of breach. UWT alleged that it had fulfilled its obligations under this Agreement by finding a buyer, ISAB, an Italian refinery, for 200,000 metric tons (MT) of respondents' oil. UWT

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[1]The record establishes no factual basis for UWT's breach of contract claims against the Ministry and Kazcom. As to the Ministry, UWT pleaded on information and belief that the Ministry had assumed MOP's obligations under the Preliminary Agreement and the Crude Oil Contract. The Ministry filed an affidavit expressly denying this allegation, and UWT failed to refute this proof. As to Kazcom, UWT could not identify any contractual obligations owed or breached by Kazcom. These are additional grounds available to these respondents to support affirmance if the Court were to grant certiorari. See infra at 6 n.2.

claimed that the Agreement required MOP to sell UWT an additional 800,000 MT of oil during the remainder of the year, and that MOP had failed to do so. The Preliminary Agreement made no reference to the United States, any U.S. bank, or U.S. dollars. To establish that MOP's alleged breach had a "direct effect in the United States", UWT asserted that the sales of the remaining oil would have occurred in a manner similar to the sales of the first 200,000 MT. The latter sales were made pursuant to a January 23, 1992 Contract for Sale of Crude Oil. The petition contains several inaccuracies concerning the terms of the Crude Oil Contract and the parties' performance thereunder.

The Crude Oil Contract, between MOP as seller and UWT and Kazcom as buyers, provided that the first 200,000 MT of oil would be sold in four separate shipments. The payment provision of the Crude Oil Contract required UWT to obtain a letter of credit in favor of MOP from "a first class European/U.S.A. bank." The parties' performance was as follows:

1. UWT selected the London Branch of the Instituto Bancario San Paolo di Torino S.P.A. and caused it to issue a letter of credit in favor of MOP;

2. The London branch of the San Paolo Bank notified Kazvnesheconombank in Almaty, Kazakhstan, via Barclay's Bank in London of the issuance of the letter of credit;

3. Kazvnesheconombank notified MOP of the posting of the letter of credit;

4. MOP delivered oil via pipeline from Kazakhstan to UWT at the Black Sea port of Novorossiysk for loading onto tankers, which delivered the oil to ISAB's refinery in Sicily;

5. MOP sent the shipping documents through Kazvnesheconombank to the London branch of the San Paolo Bank;

6. Upon presentation of the shipping documents, the London branch of the San Paolo Bank made payment in favor of MOP to Kazvnesheconombank's account with Credit Commercial de France in Paris.

UWT asserts that "[t]he designation of a European/U.S.A. bank as the means of achieving payment between UWT and the Respondents was an integral and necessary part of the transaction." Pet. at 7; accord id. at 14. In fact, the Crude Oil Contract contained no requirement that the European bank that UWT selected have a presence in the United States. UWT's assertion that the "unrebutted testimony, supported by the [Crude Oil] Contract itself, established that the transaction between UWT and Respondents could only occur if . . . a U.S. bank was involved," Pet. at 14, is equally erroneous. There is no record support for UWT's assertion that the transaction "could only occur" in this fashion; UWT itself chose the San Paolo Bank in London to play the key role. While UWT filed an affidavit asserting that the parties' intent was to use a U.S. bank for making payments to MOP, respondents filed an affidavit expressly denying that this was the parties' intent. In any event, nothing in the Crude Oil Contract required UWT to involve a United States bank; UWT could have obtained payment from ISAB in U.S. dollars or the San Paolo Bank in London could have arranged for a non-U.S. bank to convert the funds to U.S. dollars, avoiding any need for a U.S. bank to make the conversion.

Instead, UWT chose to accept payment from ISAB in lira; the San Paolo Bank in London then arranged for conversion of those funds into U.S. dollars. The conversion took place as follows: ISAB transmitted payment in lira to UWT's account in the San Paolo Bank in London; that bank transferred the lira to its branch in New York; for a fee paid by UWT, the San Paolo Bank's New York branch had a U.S. bank (Citibank) convert the lira into U.S. dollars; Citibank returned the funds to the San Paolo Bank's New York branch; and the New York branch transferred them to the London branch, which transmitted them to MOP's bank in Paris in payment for the Kazakh oil.

There is no record support for the assertion that "[o]nce converted into U.S. dollars, Citibank transferred 97 percent of the proceeds to MOP's bank in Paris . . . ." Pet. at 7. Rather, Citibank returned the funds to the San Paolo Bank's New York branch, which, in turn, transferred the funds to UWT's account at the San Paolo Bank in London. That bank then transmitted them to MOP's Paris bank.

UWT asserts that

> It was UWT's and Respondents' customary practice to use the New York branch of the San Paolo Bank, as well as

> Citibank, New York, to convert the oil payments into U.S. dollars and to distribute those proceeds to the parties. Whether the Contract required the use of New York banks is not germane, because the parties actually employed the services of these banks over a period of time.

Pet. at 14 (emphasis in the original). In fact, none of the respondents used New York banks for anything; the "practice" UWT is describing was solely the San Paolo Bank's on behalf of UWT, taken unilaterally without any knowledge or participation by respondents.

UWT's allegation that the breach of the Preliminary Agreement caused a "direct effect in the United States" was premised on a series of assumptions concerning the terms on which future sales of oil would have been made. UWT assumed that such future sales would have been made on the terms, including the requirement of payment in U.S. dollars, set forth in the Crude Oil Contract and the parties' performance thereunder; that the San Paolo Bank in London would have accepted payment from UWT's purchaser in foreign currency; that the San Paolo Bank in London would have followed the same practice for converting that currency into U.S. dollars, thereby paying Citibank or some other U.S. bank a fee for doing the conversion; and that upon breach by MOP, Citibank would lose its conversion fees.

2. MOP's Alleged Breach Of The Crude Oil Contract.

UWT also alleged that respondents lost the original bill of lading for the third shipment. UWT therefore could furnish only a copy of the bill of lading to its Italian purchaser, ISAB. UWT's failure to produce the original bill was a breach of UWT's contract with ISAB.

To the extent the petition suggests that MOP failed to deliver the full 200,000 MT of oil required under the Crude Oil Contract, and that UWT did not receive payment for the third and fourth shipments of oil under the Contract, Pet. at 7-8, it is erroneous. MOP's performance was not halted after the third shipment; the fourth and final shipment of oil under the Contract occurred without incident. In addition, ISAB paid UWT in full for both shipments. UWT, however, failed to pay MOP the $5,313,369.84 UWT owed for the third shipment and withheld $694,167.62 of the $3,991,008.37 it owed MOP for the fourth shipment.

The payments from ISAB to UWT for the third and fourth shipments presumably were converted into U.S. dollars in accordance with UWT's alleged practice. In any event, UWT did not allege that any activity of respondents would have prevented such conversion. Thus, as to this claimed breach of the Crude Oil Contract, UWT did not contend that any act of MOP had any effect on UWT's conversion of funds under the Crude Oil Contract.

Rather, UWT claimed that the "direct effect" of MOP's failure to supply the original bill of lading for the third shipment was that "UWT had to issue a contractual guaranty to indemnify the refinery against potential third-party claims . . . ." Pet. at 7. While UWT's affidavits showed that UWT offered to give ISAB such a guaranty, MOP's unrefuted evidence demonstrated that ISAB rejected this offer. MOP's evidence also showed that ISAB sought and obtained a letter of indemnity from the Ministry, after which ISAB paid UWT for the oil -- a payment that UWT still has not remitted to MOP. See supra at 5.[2]

REASONS FOR DENYING CERTIORARI

The court of appeals decision rests on a straightforward, correct application of this Court's holding in Republic of Argentina v. Weltover, Inc., 112 S. Ct. 2160 (1992), to the unique facts of this case. Petitioner's arguments to the contrary misread Weltover, the court of appeals decision, or the record, and, in any event, require facts that are not present here. The court of appeals decision creates no conflict with a decision of any other circuit court; indeed, the decision is fully consistent with other circuit court rulings. The petition should be denied.[3]

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[2]The dispute concerning payment to MOP for the third and fourth shipments is currently the subject of an arbitration proceeding in London, governed by English law, pursuant to the Crude Oil Contract.

[3]The court of appeals did not reach the other grounds, i.e., lack of personal jurisdiction and improper venue, that the district court had found to warrant dismissal. App. at 2 n.1. If certiorari were granted, these other grounds would be available here as alternative independent grounds to support the judgment of the court of appeals. See, e.g., Granfinanciera, S.A. v. Nordberg, 492 U.S. 33, 38-39 (1989); United States v. Arthur Young & Co., 465 U.S. 805, 814 n.12 (1984); Blum v. Bacon, 457 U.S.

(continued...)

I.

Much of the petition misapprehends Weltover, the court of appeals decision, or the record. For instance, petitioner's principal argument is that the court of appeals "read this Court's decisions in Weltover to require that the foreign sovereign's place of performance must be in the United States for courts to have jurisdiction under the FSIA." Pet. at 9. The court of appeals simply distinguished Weltover on this basis, noting that here, the performance of all parties to the contract, including that of respondents, was to occur outside the United States. App. at 10, 11. Drawing this obvious factual distinction falls far short of reading Weltover to impose such a requirement.

The petition also claims that Weltover is indistinguishable because "money which should have been converted into U.S. dollars and then distributed to UWT and Respondents by New York banks (with resulting commissions and fees to the bank) was not forthcoming." Pet. at 11. This argument misstates the terms of the Crude Oil Contract. That Contract did not require U.S. banks to convert funds into U.S. dollars and distribute them to UWT and respondents. In international business transactions such as this, U.S. dollars are a widely accepted currency, readily obtainable throughout the world. UWT, on its own, chose to accept payment from its purchaser in foreign funds and UWT's bank, the San Paolo Bank in London, chose to have those funds converted into U.S. dollars by a U.S. bank, thereby involving Citibank in New York.

The court of appeals concluded correctly that the cessation of UWT's voluntarily chosen means of procuring U.S. dollars was not "'an immediate consequence of the defendant's . . . activity.'" App. at 11 (quoting Weltover, 112 S. Ct. at 2168). By this ruling, the court of appeals gave effect to the plain language of the FSIA, which requires a showing that the foreign sovereign's act on which the claim is based – not an act of the plaintiff – caused a direct effect in the United States. 28 U.S.C.A. § 1605(a)(2); App. at 11-12 & n.4. This ruling is fully consistent with how this Court and other circuit courts have applied the "direct effect" requirement. Weltover, 112 S. Ct. at 2168-69; Commercial Bank

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[3](...continued)
132, 137 n.5 (1982). Moreover, any issues not resolved in this Court would remain open for resolution in the court of appeals.

of Kuwait v. Rafidain Bank, 15 F.3d 238, 241 (2d Cir. 1994); Antares Aircraft, L.P. v. Federal Republic of Nigeria, 999 F.2d 33, 35 (2d Cir. 1993); Texas Trading & Milling Corp. v. Federal Republic of Nigeria, 647 F.2d 300, 312 (2d Cir. 1981), cert. denied, 454 U.S. 1148 (1982); General Electric Capital Corp. v. Grossman, 991 F.2d 1376, 1385 (8th Cir. 1993).

In petitioner's view, "Weltover [held] that the disruption of payments through banks in the United States satisfied the 'direct effect' requirement." Pet. at 11-12. Weltover itself refutes this overbroad, oversimplified reading. In Weltover, the foreign sovereign, at the choice of the plaintiffs, was contractually obligated to make "payments through [a] bank[ ] in the United States." Pet. at 11-12; Weltover, 112 S. Ct. at 2168. Hence, the sovereign's breach of that obligation "necessarily had a 'direct effect' in the United States." Weltover, 112 S. Ct. at 2168. Here, by contrast, there was no contractual obligation to make payments through banks in the United States. In fact, no payments were made through such banks; the payments were made through banks in London and Paris.

Apparently attempting to create a conflict among circuits, petitioner looks to the concurring opinion in Goodman Holdings v. Rafidain Bank, 26 F.3d 1143, 1146-47 (D.C. Cir. 1994) (Wald, J., concurring). Goodman fully supports, rather than conflicts with, the court of appeals decision. In Goodman, the contractual obligation at issue was payment under letters of credit issued by banks that were branches of the Iraqi government. 26 F.3d at 1144. Payment was not required to be made in the United States or from funds on deposit in the United States, even though the bank often had in fact used such United States funds. Goodman found that the requisite "direct effect in the United States" did not exist and therefore, neither did subject matter jurisdiction. 26 F.3d at 1145. This ruling is fully consistent with the court of appeals decision in this case.

Petitioner argues that under "the parameters set out" by the concurring opinion in Goodman, the direct effect requirement was met in this case. Pet. at 14. Even if this Court were to adopt those parameters, they would not alter the result here. For instance, the concurring opinion would find a "direct effect" where the contract specifically required funds to be channeled through the United States, the breach prevented the funds from reaching their intended destination, and the funds therefore remained in the United States accounts. 26 F.3d at 1147. In the instant case there

was no such express requirement of the sovereign; none of the respondents had any obligation to send any oil sales proceeds through the United States.

The Goodman concurrence also would find a "direct effect" where pursuant to a longstanding and consistent course of dealing between the contracting parties, the sovereign in fact had made contractual payments from its New York accounts. Id. at 1147. Once again, this view would have no impact on the outcome here: there was not a single instance of any of the respondents performing any acts in the United States that had anything to do with their contracts with UWT.

Petitioner's assertion that the court of appeals decision conflicts with Walter Fuller Aircraft Sales, Inc. v. Republic of Philippines, 965 F.2d 1375, 1387 (5th Cir. 1992), Pet. at 9-10, is equally without merit. In Walter Fuller, the sovereign effectively committed itself to contractual performance in the United States. There, the Philippine Presidential Commission on Good Government (the "PCGG") seized an airplane that had been leased to a Philippine corporation, and sold it to Fuller, an American corporation. In the deed of sale, the PCGG made an explicit promise "to defend and hold harmless [Fuller] from any and all claims of all persons whosoever, including but not limited to adverse claims . . . ." 965 F.2d at 1378. After the true owner of the airplane brought a quiet title action in Arkansas, Fuller sued the PCGG in Texas to recover its costs of defending the Arkansas suit. The district court held that it had subject matter jurisdiction over claims against the PCGG, and the Fifth Circuit affirmed. Id. at 1377, 1386-87. Relying on the deed of sale, the Fifth Circuit held that the PCGG had contractually agreed to defend Fuller in the Arkansas suit, and that the PCGG's breach had caused a direct consequence – Fuller providing its own defense – in the United States. Id. at 1387. Here, by contrast, respondents did not agree to do anything in the United States and so, their alleged breach did not cause any direct consequence in this country.

UWT relies on one other case, a district court decision never tested on appeal, AMPAC Group, Inc. v. Republic of Honduras, 797 F. Supp. 973 (S.D. Fla. 1992). AMPAC upheld jurisdiction on grounds that the sovereign's acts allegedly had caused the United States plaintiff corporation to suffer damages from Honduras' breach of a contract to sell a cement plant to the plaintiff. Id. at 977.

The federal circuit courts, by contrast, have consistently ruled that mere financial loss suffered by a plaintiff in the United States is not enough to satisfy the direct effect requirement. Antares Aircraft, 999 F.2d at 36 (fact "that an American individual or firm suffers some financial loss from a foreign tort cannot, standing alone, suffice to trigger the exception"); Gregorian v. Izvestia, 871 F.2d 1515, 1527 (9th Cir.), cert. denied, 493 U.S. 891 (1989) ("[M]ere financial loss suffered by a plaintiff in the United States as the result of the action abroad of a foreign state does not constitute a 'direct effect' and therefore cannot by itself create subject matter jurisdiction under section 1605(a)(2)."); Zedan v. Kingdom of Saudi Arabia, 849 F.2d 1511, 1515 (D.C. Cir. 1988) (financial loss in the United States must be accompanied by "something legally significant" that happened in the United States for FSIA jurisdiction to attach); Grossman, 991 F.2d at 1385-86 (injury to General Electric in the United States did not qualify as "direct effect"); Maizus v. Welder Trust Reg., 820 F. Supp. 101, 104 (S.D.N.Y. 1993) (injury to United States corporation buying oil from Nigeria held not to be a sufficient basis for jurisdiction under FSIA).

Finally, the petition seeks review on grounds that transactions similar to those at issue here will become more and more frequent. Pet. at 14. If anything, this consideration counsels against review. The principal feature of this transaction is that the Crude Oil Contract specified that contractual payments had to be made in U.S. dollars, as is common in many international transactions. If that feature were sufficient to satisfy the "direct effect" requirement, then "'our courts [might be] turned into small 'international courts of claims[,]' . . . open . . . to all comers to litigate any dispute which any private party may have with a foreign state anywhere in the world.'" Verlinden v. Central Bank of Nigeria, 461 U.S. 480, 490 (1983) (quotation omitted). Because the direct effect requirement was designed to prevent, not to accomplish, such an expansion of federal subject matter jurisdiction, id., review is not warranted on this basis.

II.

Petitioner's third issue, concerning the "six million dollar liability" petitioner allegedly "incurred . . . in the United States", Pet. at i, Question 3, is not presented by this record. In the district court, UWT alleged that following respondents' loss of the bill of lading for the third shipment of oil, UWT was required to furnish ISAB with a $6 million contractual guaranty. The petition repeats this allegation, asserting that this alleged guaranty was "incurred" or "posted" in the United States. Pet. at i, Ques-

tion 3, id. at 7, 15. But the undisputed evidence established that ISAB rejected UWT's proffered guaranty. Because there is no factual predicate for this aspect of the petition, it should be denied.

Even if ISAB had accepted UWT's contractual guaranty, that fact would not support a grant of certiorari review. UWT offered no evidence that the guaranty had any connection with the United States: it did not show where the guaranty was issued or how it had any effect in the United States. Moreover, the guaranty arose from UWT's contract with ISAB, not from any of UWT's contracts with respondents. The guaranty therefore could not constitute an immediate consequence of respondents' actions under those contracts, as both lower courts correctly held. App. at 12, 24.

In light of the complete absence of any proven connection between the alleged guaranty and the United States, UWT's reliance on Walter Fuller is misplaced. There, the sovereign had agreed, and was called upon, to perform in the United States. 965 F.2d at 1386-87. In addition, even viewed in its best light, the alleged UWT guaranty was a contingent liability that would not constitute a "direct effect." Grossman, 941 F.2d at 1385-86. When and if that liability ever became certain, it would place UWT on the same footing as a United States plaintiff claiming injury or loss in this country – a footing that the circuit courts have uniformly rejected as sufficient to constitute a "direct effect." See supra at 9-10.

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted this 22d day of December, 1994.

GORDON G. GREINER
DAVIS O. O'CONNOR
ELIZABETH A. PHELAN

HOLLAND & HART
Post Office Box 8749
Denver, CO 80201
Telephone: 303/295-8000
Attorneys for Respondents